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In the Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL,
PETITIONERS,
v.
HOBBY LOBBY STORES, INC., ET AL.

CONESTOGA WOOD SPECIALTIES CORP. ET AL,
PETITIONERS,
v.
KATHLEEN SEBELIUS, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF *AMICI CURIAE* STATES OF MICHIGAN, OHIO, AND 18 OTHER STATES FOR CONESTOGA, HOBBY LOBBY, MARDEL

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act protects the family businesses here that are closely-held, for-profit corporations operated consistent with religious principles that are contravened by the application of the HHS Mandate promulgated under the Affordable Care Act.

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INTEREST OF *AMICI CURIAE*

The *Amici* States have a strong interest in preserving their ability to structure the law of corporations, as this Court long has recognized. There is no general federal common law of corporations, and the *Amici* States urge the Court not to embark on the creation of such a thing. The apparent position of the federal government is that some national precept sounding either in federal corporate common law or in some sort of federal religious theory as applied to corporations precludes association in corporate form to carry out profit-seeking business in accordance with guiding religious principles. This view, which has no basis in statute or precedent, affronts fundamental concepts of federalism and the values of religious liberty that Congress sought to protect through the Religious Freedom Restoration Act (RFRA).

More specifically, to the extent that the position of the federal government rests on a notion that a for-profit company may act only to maximize profits and cannot take into account matters of corporate conscience, the premise contradicts longstanding state policies and undermines the States' traditional prerogatives to shape corporate law.

Further, the *Amici* States have a substantial interest in protecting religious liberty as one of the central features of American self-governing society. Religious liberty is a foundational freedom. Each state constitution has provisions safeguarding the religious exercise of the State's citizens. Like the federal government, many States have enacted additional laws to guarantee religious freedom.

Moreover, the States seek to foster a robust business climate in which diverse employers can succeed to the benefit of all: the States have a very real interest in the businesses and jobs that the harsh penalties of the HHS Mandate threaten to eradicate. The States seek to prevent judicial revision of RFRA that would fabricate a blanket exclusion from the statute's coverage for enterprises operated by families that are guided by their faiths as they engage in commerce. RFRA as written advances both liberty and prosperity. Without its protections, the family-owned businesses before this Court would be in jeopardy of having to shutter their facilities, lay off their employees, or operate under threat of draconian penalties in a way that violates sincerely held principles of religious faith.

The *Amici* States submit that Conestoga Wood Specialties, Hobby Lobby, Mardel, and businesses like them—that is, entities maintained to operate consistent with religious principles—may raise claims under RFRA, and that the HHS Mandate is a substantial burden on these family-owned, for-profit businesses. The *Amici* States thus urge this Court to affirm the decision of the *en banc* Tenth Circuit in *Hobby Lobby* and to reverse the Third Circuit panel majority in *Conestoga Wood* on RFRA grounds.

INTRODUCTION AND SUMMARY OF ARGUMENT

The threshold question here is whether for-profit, secular businesses may exercise religion and therefore fall within the religious liberty protections of RFRA. It is a question that is basic to American democracy. Its answer requires this Court to return to first principles. And the answer is a simple one.

Americans may form a corporation for profit and at the same time adhere to religious principles in their business operation. This is true whether it is the Hahns or Greens operating their businesses based on their Christian principles, a Jewish-owned deli that does not sell non-kosher foods, or a Muslim-owned financial brokerage that will not lend money for interest. The idea is as American as apple pie. And RFRA guarantees that federal regulation may not substantially burden the free exercise of religion absent a compelling governmental interest advanced through the least restrictive means.

Any contrary conclusion creates an untenable divide between for-profit and non-profit corporations. All sides admit that RFRA extends its protections beyond individuals to at least some corporations. Despite assumptions made by certain of the judges below, nothing in the relevant state laws restricts corporate endeavors to the sole purpose of maximizing revenue at all cost. There is and should be no general federal common law of corporations. And nothing in RFRA limits its application to administratively certified religious entities.

The argument put forward by the United States is predicated on a view that seeking profit changes everything. Not so. The Hahns and the Greens, as do others, seek to operate their family-owned businesses according to religious principles. That they seek also to earn a profit does not nullify or discredit their beliefs. The federal courts cannot rewrite state law on corporations somehow to change this reality.

The Mandate also imposes a substantial burden on these family-owned businesses. Conestoga, Hobby Lobby, and Mardel are guided by religious principles affirming the inviolability of human life, and no one questions the sincerity of those beliefs in these cases. Courts should not become enmeshed in evaluating the interpretive merits or proper doctrinal weight of religious principles. Their religious propriety is not for the courts to second guess. And the government lacks a compelling interest justifying the substantial burden it seeks to impose when the businesses adhere to these guiding religious principles. The Affordable Care Act includes several sweeping exceptions. The claim that the Mandate must be applied to entities with a sincere religious objection is belied by the fact that it already excludes tens of millions of plan participants.

Government directives cannot confine religious liberty to the sanctuary or sacristy. Such a truncated view of religion threatens to create a barren public square, empty of the religious beliefs of ordinary Americans. This is an important principle, and it protects all persons.

ARGUMENT

I. Congress did not exclude for-profit corporations from RFRA's protections.

The government's position that religion can be exercised through certain corporate forms but not others cannot appropriately be established as governmental religious theory and has no basis in the relevant state corporations laws. As the Tenth Circuit observes, "no one disputes that at least some types of corporate entities can bring RFRA claims." *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1129 (2013) (also noting that "the Supreme Court has affirmed the RFRA rights of corporate claimants, notwithstanding the claimants' decision to use the corporate form," citing *O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 546 U.S. 418 (2006)).

After all, Congress deliberately chose to extend the protections of RFRA not only to individuals, but to "persons." 42 U.S.C. § 2000bb(b)(2) (purpose of RFRA is "to provide a claim or defense to persons whose religious exercise is substantially burdened by government"). RFRA thus provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the test of strict scrutiny is satisfied. 42 U.S.C. § 2000bb-1(a). And Congress has made itself clear—in the very first section of the first chapter of the United States Code—that unless otherwise indicated by context, "the word[ ] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1; cf. *Mohamad* v.

Palestinian Auth., 132 S. Ct. 1702, 1707 (2012) (federal statutes and courts typically use the word "individual" when seeking "to distinguish between a natural person and a corporation").

Even the *Hobby Lobby* dissenters and the *Conestoga* panel majority, along with the government, concede that RFRA does not limit its protections to "individuals" and that, for example, "Congress clearly recognized that . . . religious organizations enjoy free exercise rights, and . . . that RFRA's reach would extend to them." *Hobby Lobby*, 723 F.3d at 1169 (Briscoe, C.J., dissenting); *Conestoga*, 724 F.3d at 385 ("other religious entities" along with churches can exercise religion); U.S. Pet. in *Hobby Lobby* at 19 (adopting Judge Briscoe's formulation and acknowledging that RFRA extends beyond individuals to reach various religious "'organizations'" and "institutions"). Nonetheless, they take the view that, while non-profits or corporations the government deems not "secular" are "able to engage in religious exercise" under RFRA, "a for-profit, secular corporation" is categorically excluded from RFRA protections. See, e.g., *Conestoga*, 724 F.3d at 388.[1] But RFRA's statutory language, universally acknowledged as extending beyond individuals, makes no such distinction. "[T]he plain language of

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[1] The *Conestoga* panel majority does not analyze the RFRA question apart from its First Amendment discussion, but conflates the two issues by stating that "[o]ur conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion . . . [,so Conestoga] cannot assert a RFRA claim." *Id.*

the text encompasses 'corporations,' including ones like Hobby Lobby and Mardel." 723 F.3d at 1129.

Rather than accepting the binary choice the Dictionary Act suggests between a context in which "persons" includes corporations and one in which, contrary to general rule, "persons" excludes corporations, the government and certain of the lower court judges somehow divine that Congress intended—silently—to distinguish among different types of corporations and flatly exclude from RFRA protection those authorized by state charter to engage in for-profit commerce. Congress, they say, intended to delineate a distinction based on tax status and the IRS code. But "[t]hat line is nowhere to be found in the text of RFRA or any related act of Congress. Nor can it be found in the statute's broader contextual purpose." *Korte* v. *Sebelius*, 735 F.3d 654, 675 (7th Cir. 2013).

The textually required "interpretive presumption," cf. *Soto-Hernandez* v. *Holder*, 729 F.3d 1, 5 (1st Cir. 2013) (evaluating in another context Dictionary Act's "context" phrase), that "person" includes corporations and associations unless the context indicates otherwise is not trumped by legislative history. "'Context' here means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts, and this is simply an instance of the word's ordinary meaning . . . . If Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase . . . " *Rowland* v. *California Men's Colony*, 506 U.S. 194, 199 (1993). So, ineluctably, the lack of any legislative history

suggesting that some in Congress may have wanted to limit the reach of RFRA contrary to the usual Dictionary Act presumption cannot provide "context" to overcome the general rule.

Given the text of the enactment and this Court's precedents, courts may not reverse the presumption simply because Congress did not debate the presumption in enacting RFRA. Chief Judge Briscoe's *Hobby Lobby* dissent thus errs in seeking to stand the presumption on its head. 723 F.3d at 1167 (Briscoe, C.J.: "it is unreasonable to assume from Congress's silence that Congress anticipated that for-profit corporations would be covered as 'persons' under RFRA"; also making a similar countertextual argument that "[a]t the time of RFRA's passage, the Supreme Court had never addressed whether . . . a for-profit corporation possessed free exercise rights under the First Amendment").[2]

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[2] The Sixth Circuit panel decision in *Autocam Corp.* v. *Sebelius*, 730 F.3d 618 (6th Cir. 2013), also acknowledges that RFRA's "legislative history makes no mention of for-profit corporations." *Id.* at 627. But from this lack of evidence, the Sixth Circuit concludes: "This is a sufficient indication that Congress did not intend the term 'person' to cover entities like Autocam when it enacted RFRA." *Id.* Jurists in equally good faith could conclude precisely the opposite—that the absence of any legislative history that Congress sought to exclude for-profit corporations proves that the government has failed to overcome the presumption that they qualify as "persons." Regardless, the concept of Congress legislating through silence in legislative history presents a treacherous path, and the *Amici* States urge that the prudent course is to rely on what Congress actually said in the statute that it passed.

The government, confronted with the acknowledged application of RFRA to certain corporations, and unable to point to any enactment or even congressional statements drawing its proposed for-profit/non-profit distinction in the RFRA context, instead leans upon an apparent amalgam of governmentally determined religious theory and a federal gloss on state corporations law. The government's position errs both in suggesting that religious belief cannot be practiced in a commercial endeavor, and in urging federal courts to superimpose onto state law a concept that religious practice somehow is incompatible with state law principles of limited liability (principles that do not hinge on profit status).

Because the government's position appears to rest on a mishmash of religious opinion and state corporate law apprehensions, it is useful to unpack what analytically should be separate components.

A. The government can establish no universal religious principle excluding the for-profit corporate form as a "means" for the practice of religion.

The record is unequivocal that the devout Christian Mennonite family that owns Conestoga Wood and the devout Christian family that operates Hobby Lobby and Mardel understand as a matter of their religious faiths that their family companies provide a "means by which individuals [should] practice religion" (to use a formulation of the *Conestoga* panel majority, 724 F.3d at 386). "It is undisputed that the Hahns are entirely committed to

their faith, which influences all aspects of their lives. They feel bound, as the district court observed, 'to operate Conestoga in accordance with their religious beliefs and moral principles.'" 724 F.3d at 390 (Jordan, J., dissenting) (quoting *Conestoga Wood Specialties Corp.* v. *Sebelius*, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013); cf. 724 F.3d at 389 ("our decision here is in no way intended to marginalize the Hahns' commitment to the Mennonite faith"); *Hobby Lobby*, 723 F.3d at 1120, 1121-22 (Hobby Lobby and Mardel are closely held family businesses whose owners "operate them according to a set of Christian principles." for "[t]he Greens have organized their businesses with express religious principles in mind").

The government and the judges who have adopted its position provide no support for their implicit assumption that while the non-profit corporate form may provide a "means by which individuals practice religion," the for-profit corporate form cannot. See *Conestoga*, 724 F.3d at 386 ("That churches—as means by which individuals practice religion—have long enjoyed the protections of the Free Exercise Clause is not determinative of the question of whether for-profit, secular corporations should be granted these same protections"). Indeed, Chief Judge Briscoe's *Hobby Lobby* dissent finds the (religious) proposition that anyone could understand operation of "a successful for-profit corporation" as a "form of evangelism" to be "most remarkabl[e]." 723 F.3d at 1172. A judge is entitled, of course, to her own religious views. But the *Amici* States submit that what is truly "remarkable" in our pluralistic society is that the government would seek to

enshrine this theological conclusion as the basis for regulation.

After all, the question of what sort of corporate entity may provide a "means by which individuals practice religion" would seem intrinsically a religious one and not readily or appropriately susceptible of government determination. And to any extent that it might be fitting for government to ponder the matter, some have found it far easier to conceive of religious views that would understand all aspects of endeavor as a "means by which" to practice religion than to identify any certain religion that insists that religious practice be confined exclusively to church services. "At bottom, the government's argument is premised on a far-too-narrow view of religious freedom. Religious exercise is protected in the home and the house of worship but not beyond. Religious people do not practice their faith in that compartmentalized way; free exercise rights are not so circumscribed." *Korte*, 735 F.3d at 681.

Because the Hahns and the Greens believe that their religions require that they live out their faiths in all their walks of life, it is not clear by what principle the government concludes that church corporations may provide a "means by which" these Americans may practice their religion but their family-held businesses cannot. To whatever extent this unexplained conclusion is advanced as a matter of religious doctrine, the lower court judges who have adopted it exceed their proper scope in decreeing on the subject. As this Court has underscored: "Courts are not arbiters of scriptural interpretation." *Thomas*

v. *Review Board of Indiana Employment Sec. Division*, 450 U.S. 707, 716 (1981).

The *Amici* States have a strong interest in not having the religious views of their citizens evaluated for correctness or orthodoxy by the government or the federal courts. And Congress has protected that interest through RFRA, defining the protected "exercise of religion" broadly as "any exercise of religion, whether or not compelled by or central to, a system of religious belief." 42 U.S.C. § 2000bb-2 (referencing 42 U.S.C. § 2000cc-5's definition). If it is the view of at least some religions, or more precisely some religious adherents, that religion is to inform all aspects of one's life and can be practiced behind the checkout counter at a wood-products store, the kosher deli, or the local family bookstore, it is not for the government to gainsay such belief.

The only further light that supporters of the government's position shed on the religious theory component of their analysis in the determinations below is found in the *Conestoga* panel's quotation from the reversed district court opinion in *Hobby Lobby*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), rev'd en banc, 723 F.3d 1114 (10th Cir. 2013), that "[g]eneral business corporations do not . . . exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." 724 F.3d at 385. But the fact that corporations can act only through human agency in no way distinguishes for-profit corporations from the non-profits and churches that the panel concedes can exercise religion. Churches do

not pray or "observe the sacraments or take other religiously-motivated actions separate and apart" from their individual actors any more than Conestoga or Hobby Lobby or Mardel do, and RFRA protections extend to guard their corporate religious exercise precisely to safeguard the religious liberties of the "individual actors" involved. See *Hobby Lobby*, 723 F.3d at 1136 ("The Church of Lukumi Babalu Aye, Inc., for example, did not *itself* pray, worship, or observe sacraments—nor did the sect in *O Centro*. But both certainly have Free Exercise rights.") (emphasis in original).

People commonly associate to exercise religion, and religion can be exercised through the corporate form. See, e.g., *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525 (1993) ("[The] Church of the Lukumi Babalu Aye, Inc. is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion."). And neither the *Conestoga* panel majority nor the district court *Hobby Lobby* opinion on which it relies ever explains how any corporate entity—including those that they and the government acknowledge do qualify for RFRA protection—can exercise religion apart from the direction and management of the human beings who participate in them. That is the way that all entities work.

Similarly, *Conestoga*'s related suggestion that corporations are excluded from RFRA protection because they cannot "'believe' at all," 724 F.3d at 385 (quoting implication from Judge Briscoe's *Hobby Lobby* dissent), again fails to reckon with the

universal acknowledgment that RFRA protects churches and other non-profit religious corporations. Nor can the suggestion be reconciled with decades of precedent that the right to express corporate views (views held and shared corporately, even if deemed not "believed") indeed is constitutionally protected. Cf. *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).[3]

As Judge Jordan's *Conestoga* dissent notes, "[o]f course, corporations do not picket, or march on Capitol Hill, or canvas door-to-door for moral causes either, but the [m]ajority would not claim that corporations do not have First Amendment rights to free speech or to petition the government. Corporations have those rights . . . because we are concerned in this case with people, even when they operate through the particular form of association called a corporation." 724 F.3d at 398 n.14.

Thus, the government's position rests on what the *Conestoga* majority identifies as a failure to "see how a for-profit 'artificial being, invisible, intangible,

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[3] Moreover, the law is accustomed to looking to the conduct and intent of humans in assessing corporate purposes or intent. See, e.g., M. Rienzi, *God and the Profits: Is There Religious Liberty For Money-Makers?* 21 Geo. Mason L. Rev. 59, 112, 116 (2013), (recognizing that for-profit corporations can form criminal intent, be found liable for religious discrimination, assert rights under the Establishment Clause, and act on corporate ethical and environmental views: "the corporate form does not foreclose assertion of . . . RFRA rights," and there is "no principled or permissible reason to treat religious exercise in [a] . . . disfavored manner").

and existing only in contemplation of law,' . . . that was created to make money could exercise such an inherently 'human' right." 724 F.3d at 385 (citation omitted). Because all corporations are in this sense "artificial . . .. invisible, intangible, and existing only in contemplation of law," the only distinction the panel majority identifies between (covered) non-profits and for-profit entities to which the government says RFRA protections do not extend is found in the phrase "created to make money." But to say that for-profit corporations are not covered because they are for-profit is not so much an explanation as a tautology. *Conestoga* provides no real explanation for the analytic distinction. As the Tenth Circuit observes, no legal principle precludes entering "the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values. As a court, we do not see how we can distinguish this form of evangelism from any other." *Hobby Lobby*, 723 F.3d at 1135. And an individual Judge's hesitation over that religious concept is not an appropriate basis for legal decision and is trumped in any event by the text of RFRA.

Surely no judicially cognizable universal religious principle marks "profit" as invalidating any and all religious exercise. Cf. *Thomas*, 450 U.S. at 709-11; *Sherbert* v. *Verner*, 374 U.S. 398, 399-400 (1963). At least for government purposes under RFRA, "[t]here is nothing inherently incompatible between religious exercise and profit-seeking." *Korte*, 735 F.3d at 681. On the flip side, too, generally "[t]he fact that a corporation is one not for profit does not mean that its activities or enterprises may not be

conducted for gain, profit, or net income so long as it is used for the purposes set forth in its articles and there is no pecuniary gain to the incorporators or members nor distribution of income or profits to them." 1 Fletcher Cyc. Corp. §68.05.

RFRA applies broadly to any sincere religious exercise and even in the context of generally applicable and neutral regulation. 42 U.S.C. §2000bb-1(a). Nothing in its text begins to suggest that Congress intended a carve-out based, for example, on whether Mardel elects to sell its Bibles at a price-point that yields a monetary "profit," or at a price that yields a loss. The government to date has not offered any citation supporting the proposition that religion is so alien to the marketplace that it never can be exercised in commercial pursuits. Nonetheless, "[o]n the government's understanding of religious liberty, a Jewish restaurant operating for profit could be denied the right to observe Kosher dietary restrictions. That cannot be right." *Korte*, 735 F.3d at 681.

What remains of the government's theory depends, then, on the view that some nationally applicable theory of the law of corporations bars for-profit corporations from pursuing any motive beyond profit seeking.

B. The federal judiciary should not impose on the state law of corporations a rule mandating that for-profit corporations may pursue only policies best calculated "to make money."

Just as "profit" is not a dirty word that automatically should discredit the values by which an enterprise is operated, neither is it necessarily the exclusive animating reason for corporate existence of family-owned businesses such as Conestoga, Hobby Lobby, and Mardel. States do not generally require for-profit corporations to reject all goals that do not maximize revenues, and the government points to no federal law to that effect.

Rather, states including Pennsylvania and Oklahoma (the states of incorporation of the companies at issue here) allow corporations to be formed and operated for lawful purposes including the pursuit of their owners' conception of the public good in the business context. The federal courts should not deem pursuit of such higher ends to be somehow inconsistent with a hope of remuneration in the here and now. So long as they act consistent with their fiduciary responsibilities to shareholders, corporate charters, and other applicable requirements, corporate directors may lead their companies to pursue a wide variety of missions. See, e.g., 15 Pa. Cons. Stat. § 1715(a)(1) (explicitly authorizing corporate directors to "consider to the extent they deem appropriate" factors including the effects of any corporate action not only on the Hahn family as shareholders and their employees and customers, but upon the broader communities in which Conestoga operates). Federal courts should

not engraft onto state law new constraints restricting all corporate policies solely to those best calculated "to make money." Cf. *Conestoga*, 724 F.3d at 385.

Significantly, neither the government nor the judges below who adopt its position identify any provision of Pennsylvania or Oklahoma law that precludes a corporation from operating according to guiding religious principles agreed upon by its ownership. The *Amici* States also are aware of no such relevant law. Cf. 15 Pa. Cons. Stat. §1301 (business corporations may be incorporated "for any lawful purpose or purposes"), §1501 (business corporations given "the legal capacity of natural persons to act"); 18 Okl. St. §1005(B) (corporation may be incorporated or organized "to conduct or promote any lawful business or purposes" not barred by state law), §1016(9) (corporations may contribute to the public welfare). Hence, family-owned companies that sell products and create jobs may be operated legally, as a general matter, according to agreed-upon guiding religious principles of their owners regardless of whether such companies are organized under Pennsylvania's or Oklahoma's general business or non-profit statutes. And RFRA ensures that the guiding religious principles under which they are operated can be overridden by federal dictate only where that federal policy satisfies strict scrutiny.

For example, a corporation formed to foster "green energy," as part of its ownership's commitment to ecological stewardship, should not be barred for that reason by some sort of federal common law of corporate responsibility from seeking

to earn a profit. The states are fully entitled to calibrate their laws on corporations to acknowledge and account for that exercise of corporate citizenship, and to determine that doing so in no way undermines their legal structures. And the government does not go so far as to suggest that Pennsylvania or Oklahoma law must constrain closely-held family companies to be guided by principles of social conscience only to the extent that those guiding principles eschew religion. Cf. *Thomas*, 450 U.S. at 718-19.

Yet the *Conestoga* panel majority reasons that to hold that a for-profit corporation can engage in religious exercise as defined by RFRA "would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners." 724 F.3d at 389. What the panel majority does not explain is—why? As the majority notes, corporations pursue the freedom of speech with some regularity, *id.* at 400; the victory achieved in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), for example, has not "eviscerate[d]" the principles of corporate law. An editorial page may reflect the views of individual members of its board, and no one suggests that free speech accommodations in the law of libel demand surrender of a newspaper company's limited liability as some sort of judicially ordained fair trade. The *Amici* States find no provision of Pennsylvania or Oklahoma law suggesting that limited liability and operation of a family business according to religious principles may not go hand-in-hand.

Again, this is not a judgment for federal courts to be making. The *Conestoga* majority draws on no provision of Pennsylvania law in decreeing that corporations organized for profit cannot—because they operate under limited liability rules that extend also to non-profit corporations—exercise religion in following guiding religious principles established by their ownership. Rather, the panel majority appears to adopt a general common law rule to that effect.

But as this Court has observed, there is no general federal common law of corporations. *Federal Election Comm'n* v. *NRWC*, 459 U.S. 197, 204 (1982); *Burks* v. *Lakser*, 441 U.S. 471, 478 (1979) ("the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law . . and it is state law which is the font of corporate directors' powers"). And Pennsylvania law says that non-profit status—which the panel majority finds to be compatible with religious exercise—does not preclude limited liability treatment for corporate participants. 15 Pa. Cons. Stat. § 5553 ("A member of a nonprofit corporation shall not be liable, solely by reason of being a member . . . for a debt, obligation, or liability of the corporation"). Oklahoma law is much to the same effect. 18 Okl. St. §§ 865-66, 1124(B) (corporate directors). See also *Korte*, 735 F.3d at 675 ("we take it as both conceded and noncontroversial that the use of the corporate form and the associated legal attributes of that status—think separate personhood, limitations on owners' liability, special tax treatment—do not disable an organization from engaging in the exercise of religion within the meaning of RFRA").

Moreover, a federal position that corporations can and should display no corporate conscience is odd given developments in social organization and state law regulation of corporations over the last century. General trends in state law permitting or favoring good corporate citizenship were well underway by the 1930s, and it was commonplace by the 1950s for state courts to observe that "modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate." See, e.g., *A.P. Smith Mfg Co.* v. *Barlow*, 98 A.2d 581, 586, 590; 13 N.J. 145 (N.J. 1953) (reviewing trends and literature, and lauding corporation's "long-visioned corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure"); cf. *Hobby Lobby*, 723 F.3d at 1147 (Hartz, J., concurring) ("no law requires a strict focus on the bottom line, and it is not uncommon for corporate executives to insist that corporations can and should advance values beyond the balance sheet and income statement." citing ALI Principles of Corporate Governance: Analysis and Recommendations § 2.01(b) (2012)).

Thus, and contrary to the implication of Chief Judge Briscoe's dissent in *Hobby Lobby*, see 723 F.3d at 1171, these developments in the States were underway many decades before the enactment of RFRA. Yes, a century ago it well may have been the law in Oklahoma that every "corporation must be organized or incorporated for a particular purpose," 723 F.3d at 1171 (Briscoe, C.J. dissenting and quoting from *Lankford* v. *Menefee*, 45 Okla. 228, 145 P. 375, 378 [1914]), but today the law of the State is

that: "It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the general corporation law of Oklahoma, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any." 18 Okl. St. § 1006(A)(3). The Oklahoma statute—that is, the law as duly adopted and updated by the people's elected representatives, pursuant to their authority under our federalist system—thus seems quite distinct from Chief Judge Briscoe's conception (advanced without citation on that score to current Oklahoma statute) that a corporation must be organized for a purpose specified with particularity and that "the specific purpose for which this new entity is created matters greatly to how it will be categorized and treated under the law." 723 F.3d at 1171. That unsupported proposition, contrary to the thrust of written state law, should not be used as the basis for a new federal common law of restricted, pecuniary corporate purpose.

In sum, RFRA protects religious organizations, "but it does not stop there. The remedy is available to any sincere religious objector—individuals and organizations alike—and its organizational applications are not limited to religiously affiliated organizations. The exemption is comprehensive in that it applies across the United States Code . . and restrains the conduct of all federal officials. But it can be overridden by a sufficiently strong governmental interest." *Korte*, 735 F.3d at 678-79. And the parade of horribles the government

summons to urge against honest application of the law both ignores the statute's compelling interest provision and expresses a post-enactment policy disagreement with Congress's application of RFRA to rules of general applicability. "The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make an exception for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rules of general applicability' . . . . Congress determined that the legislated test 'is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.' §2000bb(a)(5)." *O Centro*, 546 U.S. at 436.

And "the government's shell game," see *Gilardi* v. *U.S. Dep't of HHS*, 733 F.3d 1208, 1214 (D.C. Cir. 2013), in arguing that closely-held, for-profit companies are precluded from claiming protection under RFRA while the family ownership is also unprotected because only the company is penalized just highlights the flaws in its understanding of RFRA. It may not be much consolation to the Hahn family that the *Conestoga* "decision . . . is in no way intended to marginalize the Hahns' commitment to the Mennonite faith," 724 F.3d at 389, when it leaves them with little option but to violate their sincere understanding of that faith (through actions by which they must direct the company as coerced by ruinous fines). It places the Hahns and the Greens into a Catch-22.

The *Conestoga* majority—after ballyhooing the notion that this Court has construed free exercise "'to

secure religious liberty in the individual by prohibiting any invasions thereof by civil authority,'" see *id.* at 385 (emphasis and citation omitted)—says that RFRA provides no relief because the "family chose to incorporate and conduct business through Conestoga. thereby obtaining both the advantages and disadvantages of the corporate form," *id.* at 388. Coupled with the majority's emphasis that free exercise is "an inherently 'human right," *id.* at 385, such reasoning shows Congress's wisdom in extending RFRA protections to "persons," including family-owned businesses and other entities operated according to agreed-upon religious principles.

The *Conestoga* panel majority's contrary view would mean that RFRA scrutiny would not be triggered if federal regulation required family businesses—in violation of their guiding religious principles, but absent any showing of a compelling governmental purpose—to be open on their Sabbath, to distribute materials they deem blasphemous, or to market meat products antithetical to their religious observance. Cf. 724 F.3d at 405 (Jordan. J., dissenting) ("the Supreme Court's decisions establish that Free Exercise rights do not evaporate when one is involved in a for-profit business"). The oddity of such results under a statute designed to protect "Religious Freedom" strongly signals the fallacy of this reasoning. But again, RFRA extends its protections to "persons" as that term is commonly employed throughout federal law, and does not in any way cast out certain businesses based on their tax status. Cf. *Elgin* v. *Dep't of Treasury*, 132 S. Ct. 2126. 2134-35 (2012) ("That Congress declined to

include an exemption . . indicates that Congress intended no such exception").

In short, and as indicated "as a matter of statutory interpretation," "Congress did not exclude for-profit corporations from RFRA's protections. Such corporations can be 'persons' exercising religion for purposes of the statute." *Hobby Lobby*, 723 F.3d at 1129. The government's misguided effort to circumscribe religious liberty to only religious organizations is similar to confining religious practice to worship, as if religious principles may not animate a corporation—or a person—in public and commercial life. It is akin to suggesting that only ordained religious officials should express religious views. But this is a misunderstanding of religion and religious freedom.

II. The HHS Mandate does not pass muster under RFRA.

A. The HHS Mandate imposes a substantial burden on the free exercise of religion of Conestoga, Hobby Lobby, and Mardel as family-owned businesses.

The courts are not equipped or empowered to second-guess an adherent's own assessment of the requirements of his religious beliefs. See *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) ("it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith"); *United States* v. *Ballard*, 322 U.S. 78, 86 (1944) (adherents "may not

be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others"). This deference is not influenced by corporate form. See *O Centro*, 546 U.S. at 425 (role of an hallucinogenic tea in the sacramental system of the a Brazilian Christian Spiritist sect); *Church of the Lukumi*, 508 U.S. at 524-25 (Santeria religion).

Congress passed RFRA to ensure that courts would apply strict scrutiny to generally applicable laws that substantially burden religion. "[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2).

The two cases that RFRA cites favorably, *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), each examined state laws of general applicability and their effect on the religious exercise of the plaintiffs at issue. In *Sherbert*, this Court determined that a South Carolina law that disqualified from unemployment benefits a Seventh Day Adventist who refused to work on Saturdays had to yield to her free exercise of her religion. 374 U.S. at 410. Even though this was an "incidental burden," i.e., an unintended effect, the State was required to come forward with a compelling interest to justify it. *Id.* at 403. Similarly, in *Yoder*, a Wisconsin law obligated compulsory education through age 16. 406 U.S. at 207. This statute was an unconstitutional burden on Amish religious exercise, despite its general applicability. *Id.* at 220.

RFRA's general standards for determining whether a law "substantially burdens" a person's exercise of religion are informed by *Sherbert* and *Yoder*. The "disqualification for benefits" in *Sherbert* was a substantial burden on religious exercise:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. [*Sherbert*, 374 U.S. at 404.]

The same is true here. The HHS Mandate requires these family-owned businesses either to abandon their commitment to their guiding religious principles or face ruinous fines. For Conestoga and the Hahns, the yearly fine approaches $35 million, while for Mardel and Hobby Lobby and the Green family, the fine would be almost $475 million each year. These costs obviously dwarf the $5 fine at issue in *Yoder*.

The record below in each case shows religious belief sincerely held. In such circumstances, courts applying RFRA should acknowledge the religious claims of the family businesses and defer to their understanding of their own religious doctrine. Such deference is consistent with the Court's precedent. *Thomas*, 450 U.S. at 716.

In contrast, in *Conestoga*, the district court engaged in its own assessment of religious doctrine to determine whether the mandate is a substantial burden. It erred in investigating the Hahns' understanding of their Mennonite faith as Christians. The district court determined that the Mandate did not impose a real burden on Conestoga or on the Hahns:

> [A]ny burden imposed by the regulations is too attenuated to be considered substantial. A series of events must first occur before the actual use of an abortifacient would come into play. These events include: the payment for insurance to a group health insurance plan that will cover contraceptive services . . . ; the abortifacients must be made available to Conestoga employees through a pharmacy[ ]; and a decision must be made by a Conestoga employee and her doctor[.] [Pet. App. 35b-36b.]

Likewise in *Hobby Lobby*, the district court reached the same conclusion:

> [T]he particular burden of which plaintiffs complain is that funds . . . might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby's] plan, subsidize someone else's participation in an activity that is condemned[.] [Pet. App. 80a-81a.]

The courts adopted these positions at the invitation of the government, which claims that any burden here is "too attenuated" to qualify. But such analysis misapprehends the religious objection to

providing the mandated insurance in the first instance. The family businesses object here not to the use of the insurance by others, but to themselves being compelled to provide it. See *Korte*, 735 F.3d at 685. ("'The religious-liberty violation at issue here inheres in the coerced coverage .... not—or perhaps more precisely, not only—in the later purchase or use'.") (emphasis omitted).[4]

As an example, consider a Quaker business's commitment to pacifism and its owner's objection to handguns. If a mandate required the business either to provide handguns to employees for self-defense or to contract with a weapons supplier to provide a handgun, that would be understood as something different from paying the employees' wages. To put it another way, it is one thing for employees to use their paycheck to buy alcohol. It is an entirely different matter to compel the employer to provide the beer.

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[4] Indeed, the government seems to have understood while arguing in other contexts that the religious liberty interest here relates to religious objections to provision of the specifically mandated insurance coverage at issue. Consider, for example, the government's memorandum to this Court from earlier this year opposing the emergency application for injunction sought by the Little Sisters of the Poor in *Little Sisters of the Pooor v. Sebelius*, (No. 13A691) (memo at 2, emphasizing government's view that "[a]pplicants are not, however, situated like the for-profit corporations that brought suit in *Hobby Lobby Stores, Inc. v. Sebelius* .... [because applicants] are eligible for religious accomodations [sic] set out in the regulations that exempt them from any requirement 'to contract, arrange, pay, or refer for ... coverage").

Regardless, a federal court should not even have engaged in the weighing of religious doctrine. Rather, the courts should have accepted the good-faith belief of these family businesses that the religious principles on which they operate prohibited them not simply from using abortion-inducing drugs but also from including those drugs in their health plans under the HHS Mandate. *Thomas*, 450 U.S. at 715 (courts could not inquire into whether "the line [plaintiff] drew was an unreasonable one"); *Hernandez* v. *Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]."). See also, e.g., *Roman Catholic Archdiocese of N.Y.* v. *Sebelius*, ___ F. Supp.2d ___; 2013 WL 6579764 at *14 (ED NY, December 16, 2013) ("The Government feels that the accommodation sufficiently insulates plaintiffs from the objectionable services, but plaintiffs disagree. Again, it is not the Court's role to say that plaintiffs are wrong about their religious beliefs").

The effort at this kind of line drawing was also rejected by this Court in *United States* v. *Lee*, 455 U.S. 252 (1982). In *Lee*, the issue was whether the Social Security tax imposed an unconstitutional burden on the Amish, and the Court concluded that because "the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.* at 257. The United States had argued that the taxes did "not threaten the integrity" of their religious system. *Id.* at 257. But this Court held that such an argument

was outside the court's "competence," and the Court deferred to the community's judgment on the question. *Id.* See also *Hobby Lobby*, 723 F.3d at 1139 ("*Lee* similarly demonstrates that the burden analysis does not turn on whether the government mandate operates directly or indirectly").

As the Seventh Circuit spells out, the "government's 'attenuation' argument . . . .. purports to resolve the religious question underlying these cases: Does providing this coverage impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the [plaintiffs' faith]. No civil authority can decide that question." *Korte*, 735 F.3d at 685.

Once the actual religious free exercise right at stake is credited, the "substantial burden" imposed on that religious exercise is apparent—to exercise their religion by refusing to follow the HHS Mandate costs them heavy fines. See *Yoder*, 406 U.S. at 208, 218. There is no suggestion that the claim here is so "bizarre" or "clearly nonreligious in motivation" to be a spurious claim. *Thomas*, 450 U.S. at 715. Instead, these cases are like *Yoder*, where the Supreme Court determined that the requirement for Amish children to attend compulsory second education would "contravene[ ] the basic religious tenets and practices of the Amish faith." *Yoder*, 406 U.S. at 218. Likewise, the provision of the products at issue here would contradict the religious tenets of the Hahns and Greens as reflected in their businesses' formal policies.

In these cases, just as in *Korte*, "the federal government has placed enormous pressure on the

plaintiffs to violate their religious beliefs and conform to its regulatory mandate. Refusing to comply means ruinous fines." 735 F.3d at 683-84. And it is no answer to suggest that the companies can lower their fines to some extent by dropping employee health coverage altogether. Cf. *Hobby Lobby*, 723 F.3d at 1125 (penalties then would be some $26 million per year). Not only would the penalties still be astronomical (at millions of times the amount of the fine involved in *Yoder*), but the companies further would be forced to surrender the ability to provide a competitive benefit package for their employees. The government cannot insist upon this sort of trade-off. See, e.g., *Thomas*, 450 U.S. at 717-18 (conditioning receipt of important benefit on conduct contrary to religious faith substantially burdens religious exercise: "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial"); *Hobby Lobby*, 723 F.3d at 1141 (coerced surrender of insuring ability is a "Hobson's choice" and therefore imposes a substantial burden).

B. The United States has exempted others and does not have a compelling interest in applying this mandate to the family businesses here.

In *O Centro*, this Court outlined the proper framework for determining whether a compelling governmental interest justifies a substantial burden on a person's religious liberty. 546 U.S. at 424-31. The Court was careful to note that this examination requires an inquiry into whether there is a compelling interest to apply the government

mandate to the "*particular* claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31 (emphasis added).

This focusing of the inquiry undercuts the government's claim here, where the Mandate already contains multiple categories of employers to which the mandate does not apply, including employers with fewer than 50 employees and "grandfathered" plans with millions of plan participants. See *Newland* v. *Sebelius*, 881 F Supp.2d 1287, 1298 (D. Colo., 2012) ("this massive exemption [for grandfathered plans] completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs"). See also *Legatus* v. *Sebelius*, 901 F.Supp.2d 980, 993 (E.D. Mich. 2012). The particular businesses here have fewer than 15,000 employees total. Conestoga with approximately 1,000 employees and Hobby Lobby and Mardel with some 13,000.

In *O Centro*, 546 U.S. at 423, the government urged as a compelling interest "the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect's sincere religious practice." *Id.* (emphasis in original). This Court rebuffed the attempted uniformity justification because the Act itself contemplated exceptions since the Attorney General was authorized to grant "waiv[ers]" where consistent with the public health and safety. *Id.* at 432. Likewise here, the government claims that the Mandate must be "comprehensive," even while exempting or excluding huge numbers of businesses.

As for businesses with fewer than 50 employees, the 2007 economic census (compiled every five years) indicates that there were more than 20 million paid employees at firms nationwide with fewer than 20 employees. See Table 2b "Employment Size of Employer and Nonemployer Firms, 2007."[5] In other words, there are tens of millions of U.S. employees whose employers are not required to comply with the Mandate. not even considering the broad "grandfathering" provision. And the government "has not offered contrary estimates of individuals covered by exempt health plans" to counter the estimates based on governmental sources that some 50 million to more than 100 million people are covered by exempt health plans. *Hobby Lobby*, 723 F.3d at 1124.

"Since the government grants so many exceptions already. it can hardly argue against exempting these plaintiffs." *Korte*, 735 F.3d at 686. The fact that small employers that account for millions of employees are not subject to the ruinous penalty provisions is fatal to the government's claim that the federal mandate must be imposed on all other businesses. including the family-owned businesses here. The assertion that there can be no exceptions to this rule—even where it burdens the free exercise of religion— rings hollow. *O Centro*, 546 U.S. at 431. Even considering other businesses that are similarly-situated with the businesses here who may raise these claims, the number of businesses

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[5] This United States Census Bureau document may be found at: http://www.census.gov/econ/smallbus.html (last visited on January 17. 2014).

operated according to such religious principles pales in comparison with the other groups that are beyond the reach of the penalties.

Equally important, other less restrictive means are available to the government. The Seventh Circuit explained in *Korte* that the government can provide a "public option" for the insurance. it can provide tax incentives for suppliers to provide these medications and services at no cost to consumers, and it can provide tax incentives to consumers. 735 F.3d at 686. "No doubt there are other options." *Id.*

Thus. the genius of RFRA is to safeguard religious liberty, protecting persons from substantial burdens except when the government has a compelling justification that can be achieved by no other practical means. That justification has not been demonstrated here for these family-owned businesses and for others like them. This Court should vindicate their religious freedom and grant relief.

CONCLUSION

State *Amici* respectfully ask that this Court affirm the decision of the *en banc* Tenth Circuit in *Hobby Lobby* and reverse the decision of the Third Circuit panel in *Conestoga* on the basis of the federal Religious Freedom Restoration Act.

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